Pendakwa Raya v Tan Sri Muhammad bin Muhammad Taib

HIGH COURT (KUALA LUMPUR) — CRIMINAL TRIAL NO 45–28 OF 1998
ABDUL WAHAB J
5 JANUARY 1999

Criminal Law *— Prevention of Corruption Act — Wilfully neglecting or failing to comply with terms of notice issued by Public Prosecutor — Essential ingredients of offence — Prevention of Corruption Act 1961 s 25(2)*

Criminal Procedure *— Trial — Close of prosecution's case — Duty of court — Test of prima facie at the end of prosecution's case — Court to consider whether there is evidence not otherwise incredible — Whether court may embark on its own critical evaluation of the evidence at that stage*

Land Law *— Indefeasibility of titles and interests — Registered owner — Presumption of ownership and possession, whether rebuttable — National Land Code 1965, ss 89 & 92*

Words & Phrases *— 'Wilfully' — Prevention of Corruption Act 1961 s 25(2)*

The defendant was charged with an offence under s 25(2) of the Prevention of Corruption Act 1961 ('the Act') for wilfully neglecting or failing to comply with the terms of a written notice dated 10 April 1997 issued under s 25(1) of the Act ('the notice') requiring him to furnish a sworn statement in writing enumerating all movable or immovable property belonging to or possessed by him, his agent or trustee and by his spouse, sons and daughters. The defendant — upon service of the — submitted sworn declarations pursuant to the notice on 26 May 1997 and on 30 June 1997. Pursuant to investigations by the Anti-Corruption Agency ('the ACA'), it was discovered that the defendant had not declared four land properties, namely Lot 1593, Mukim Batang Kali and Lot 1594, Mukim Batang Kali ('the Batang Kali properties'); HS (M) 5039 Pt 11100 Bukit Lancong ('the Bukit Lancong property') and HS (D) 142249 Lot 32913 Mukim Kuala Lumpur, at 139 Jalan Athinahappan ('the Jalan Athinahappan property'). The evidence adduced by the prosecution showed that the Batang Kali properties were registered in the defendant's name whereas the Bukit Lancong and Jalan Athinahappan properties were registered in the defendant's wife's name. Thus, the main thrust of the prosecution case was that since the properties were registered in the names of the defendant and his wife at the time of the service of the notice to the defendant, the defendant ought to have declared the properties in his declaration. At the close of the case for the prosecution, the defence raised the following arguments: (i) that the prosecution failed to make out a prima facie case under s 180 of the Criminal Procedure Code ('CPC'); (ii) that the prosecution failed to adduce evidence that the notice was issued in the course of any investigation or proceeding and that the fact of an investigation or proceeding was an ingredient of the offence; (iii) that the defendant's failure to declare the properties was not wilful; and (iv) that the

prosecution failed to show any motive for the defendant neglecting or failing to declare the four properties. On the facts, the officer who issued the notice and called as a prosecution witness was not directly involved in the investigations and was not in a position to enlighten the court as to the investigations in the case. The investigation officer was also not called by the prosecution but made available to the defence. The defendant having been called upon to enter on his defence raised the following matters in his defence: (i) that the Batang Kali properties were sold to one Kamarudin bin Ahmad ('SD4') in pursuance of a sale and purchase agreement dated 29 November 1996; (ii) that the Jalan Athinahappan property was sold to his brother ('SD5') by the defendant's wife; (iii) that the Bukit Lancong property was given away by the his wife to his former driver ('SD3'); and (iv) that neither the defendant or his wife was informed of any investigation.

Held, acquitting the defendant:

(1) With the amendment to s 180 of the CPC, the court is to adopt the lower standard of proof at the end of the prosecution case as applied in *Haw Tua Tau v PP* [1981] 2 MLJ 49, ie to reserve the application of the more rigorous test of credibility to the end of the case; while in the intermediate stage at the end of the prosecution case, the applicable test is whether there is evidence not otherwise incredible in respect of the offence charged. The court acting under s 180 cannot act capriciously but must consider whether there is evidence not otherwise incredible adduced in respect of the ingredients of the offence. The court cannot embark on its own critical evaluation of the evidence but must unless the point is obvious, primarily deal with the particular issues raised in the submissions of no case to answer (see p 315C–H).

(2) Unless the notice — purportedly issued under s 25(1) and served upon the defendant — was set aside, it had to be presumed, at the close of the case for the prosecution, that the act of the DPP in issuing the notice, had been regularly performed and the notice was regularly issued in the course of an investigation or proceeding. Such notice was sufficient evidence of the existence of an investigation and it was not necessary to proceed behind the notice unless there was evidence suggesting that it was improperly or irregularly issued (see p 318F–H). The failure by the prosecution to call the investigation officer was not fatal in view of the assertion in the notice (see p 317G–H).

(3) The presumption of ownership of a registered proprietor — as provided under ss 89 and 92 of the National Land Code 1965 — is not entirely irrebuttable. A party seeking to rebut the presumption must prove his case. In the circumstances of the case, the burden was on the defendant to show that while he was the registered proprietor, the right of beneficial ownership was with another in order to dispel the strong presumption that the properties belonged to him and his wife respectively (see p 320F–G).

(4) The word 'wilfully' in s 25(2) of the Act imports into the intention or knowledge — inherent in 'neglect or fails' — the element of contumacious deliberateness (see p 323C–D). It could be said prima facie that the defendant had failed to declare the property and the burden was upon the defendant to explain and be cross-examined thereon (see p 324E–F). With regard to motive, it is generally irrelevant. Therfore, on a maximum evaluation of the evidence adduced, the prosecution had made out a prima facie case against the defendant on the offence charged.

(5) However, the evidence of SD4 corroborated the evidence of the defendant that he had parted with all beneficial interest in the two Batang Kali properties. With regard to the Jalan Athinahappan property, the defendant's contention that it had been sold was supported by the production of a sale and purchase agreement dated 29 November 1998 upon which stamp duty was paid on 6 December 1998 (see p 330H–I). The evidence adduced on behalf of the defendant in respect of the Bukit Lancong property indicated that there was a gift of the property to SD3 (see p 331B–C). Thus, upon a consideration of all the evidence adduced, the prosecution had not proved its case beyond reasonable doubt.

[Bahasa Malaysia summary

Defendan telah dituduh untuk kesalahan di bawah s 25(2) Akta Pencegahan Rasuah 1961('Akta tersebut') kerana dengan sengaja abai atau tidak patuh dengan terma notis bertulis yang bertarikh 10 April 1997 yang dikeluarkan di bawah s 25(1) Akta ('notis tersebut') yang memerlukannya untuk memberikan kenyataan bersumpah dalam bentuk bertulis yang menyenaraikan segala harta alih atau tak alih miliknya atau di dalam posesinya, atau ejen atau pemegang amanah dan juga isterinya, anak lelaki dan juga anak perempuannya. Defendan — selepas menerima notis tersebut — memberikan kenyataan bersumpah menurut notis tersebut pada 26 Mei 1997 dan pada 30 Jun 1997. Atas siasatan yang dijalankan oleh Badan Pencegah Rasuah ('BPR'), adalah didapati bahawa defendan tidak mengisytiharkan empat bidang tanah, iaitu Lot 1593, Mukim Batang Kali dan Lot 1594, Mukim Batang Kali ('harta Batang Kali tersebut'); HS (M) 5039 Pt 11100 Bukit Lancong ('harta Bukit Lancong tersebut') dan HS (D) 142249 Lot 32913 Mukim Kuala Lumpur, di 139 Jalan Athinahappan ('harta di Jln Athinahappan tersebut'). Keterangan yang dikemukakan oleh pihak pendakwa menunjukkan bahawa harta Batang Kali tersebut adalah didaftarkan di atas nama defendan sementara harta-harta di Bukit Lancong dan di Jalan Athinahappan adalah didaftarkan di atas nama isteri defendan. Jadi, hujahan utama kes pendakwaan adalah bahawa oleh kerana harta tersebut didaftarkan di atas nama defendan dan isterinya pada masa notis tersebut diberikan kepada defendan, defendan patutlah mengisytiharkan harta tersebut dalam pengisytiharaannya. Di penutup kes pendakwaan, pihak pembelaan telah mengemukakan

hujahan berikut: (i) bahawa pihak pendakwaan telah gagal untuk membuktikan suatu kes prima facie di bawah s 180 Kanun Acara Jenayah ('KAJ'); (ii) bahawa pihak pendakwaan telah gagal mengemukakan keterangan bahawa notis telah dikeluarkan semasa menjalankan penyiasatan atau prosiding dan bahawa hakikat adanya suatu penyiasatan atau prosiding adalah suatu ramuan bagi kesalahan tersebut; (iii) bahawa kegagalan defendan untuk mengisytiharkan harta tersebut bukanlah disengajakan; dan (iv) bahawa pihak pendakwaan telah gagal untuk menunjukkan sebarang motif mengapa defendan abai atau gagal untuk mengisytiharkan keempat-empat harta tersebut. Menurut fakta, pegawai yang mengeluarkan notis tersebut dan telah dipanggil sebagai saksi pendakwaan tidaklah secara terus terlibat di dalam penyiasatan dan bukanlah dalam kedudukan untuk membantu mahkamah memahami penyiasatan ke dalam kes itu. Pegawai penyiasat juga tidak dipanggil oleh pihak pendakwaan tetapi dikemukakan kepada pihak pembelaan. Pihak defendan selepas dipanggil untuk mengemukakan pembelaan telah membangkitkan beberapa perkara dalam pembelaannya: (i) bahawa harta Batang Kali tersebut telah dijual kepada seorang yang bernama Kamarudin bin Ahmad ('SD4') melalui satu perjanjian jual beli bertarikh 29 November 1996; (ii) bahawa harta Jalan Athinahappan tersebut telah dijual kepada abangnya ('SD5') oleh isteri defendan; (iii) bahawa harta Bukit Lancong telah dihadiahkan oleh isterinya kepada bekas pemandu ('SD3'); dan (iv) bahawa defendan serta isterinya tidak diberitahu tentang apa-apa penyiasatan.

Diputuskan, membebaskan defendan:

(1) Dengan pindaan kepada s 180 KAJ, mahkamah patut menerima pakai darjah pembuktian yang lebih rendah di akhir kes pendakwaan seperti yang terpakai di dalam kes *Haw Tua Tau v PP* [1981] 2 MLJ 49, iaitu untuk merizabkan pemakaian ujian kebolehpercayaan yang lebih sukar sehingga akhir kes pendakwaan; sedangkan di peringkat pertengahan di akhir kes pendakwaan, ujian yang terpakai adalah sama ada terdapat keterangan yang bukan sebaliknya tidak boleh dipercayai terhadap kesalahan yang didakwa. Mahkamah di bawah s 180 tidak boleh bertindak tidak menentu tetapi mestilah mempertimbangkan sama ada terdapat keterangan yang bukan sebaliknya tidak boleh dipercayai berkenaan ramuan kesalahan tersebut. Mahkamah tidak boleh menggunakan penilaian kritikalnya sendiri terhadap keterangan tetapi, kecuali jika kenyataan tersebut adalah jelas, mestilah menumpu kepada isu-isu tertentu yang diketengahkan semasa hujahan tiada kes untuk dijawab (lihat ms 315C–H).

(2) Kecuali jika notis itu — yang telah dikeluarkan di bawah s 25(1) dan sampai kepada defendan — diketepikan, mestilah diandaikan, di akhir kes pendakwaan bahawa tindakan TPR dalam mengeluarkan notis itu, telah dilaksanakan dengan betul dan notis tersebut telah dikeluarkan secara betul semasa

perjalanan penyiasatan. Notis sedemikian adalah keterangan mencukupi tentang wujudnya suatu penyiasatan dan adalah tidak perlu untuk meneliti di sebalik notis kecuali jika terdapat keterangan yang mencadangkan bahawa ia telah dikeluarkan dengan cara yang patut atau tidak betul (lihat ms 318F–H). Kegagalan pihak pendakwaan untuk memanggil pegawai penyiasat adalah tidak memudaratkan jika dilihat dari segi penegasan dalam notis itu (lihat ms 317G-H).

(3) Andaian pemunyaan seorang tuan punya berdaftar — seperti yang diperuntukan dalam ss 89 dan 92 Kanun Tanah Negara 1965 — bukanlah sepenuhnya tidak boleh disangkal. Suatu pihak yang cuba mengetepikan andaian ini mestilah membuktikan kesnya. Dalam keadaan kes, beban adalah terletak pada defendan untuk menunjukkan bahawa sedangkan dia merupakan tuan punya berdaftar, hak pemunyaan benefisial adalah di atas orang yang lain untuk mengetepikan andaian yang kukuh bahawa harta-harta tersebut adalah milik tertuduh dan isterinya masing-masing (lihat ms 320F–G).

(4) Perkataan 'sengaja' di dalam s 25(2) Akta tersebut mengimport niat atau pengetahuan — yang inheren di dalam 'cuai atau gagal' — iaitu elemen kedegilan yang disengajakan (lihat ms 323C–D). Boleh dikatakan bahawa secara prima facie, defendan telah gagal untuk mengisytiharkan harta dan beban adalah terletak di atas defendan untuk memberi penjelasan dan juga diperiksa-balas selepas itu (lihat ms 324E–F). Berkenaan dengan motif, ia adalah secara amnya tidak relevan. Oleh itu, atas penilaian maksimum keterangan yang diberikan, pihak pendakwaan telah membentangkan suatu kes prima facie terhadap defendan atas kesalahan yang didakwa.

(5) Walau bagaimanapun, keterangan SD4 menyokong keterangan yang diberikan oleh defendan bahawa dia telah memberikan semua hak benefisialnya dalam dua bidang tanahnya di Batang Kali. Berkenaan harta di Jalan Athinahappan pula, hujahan defendan bahawa ia telah dijual adalah disokong oleh pengemukaan perjanjian jual beli yang bertarikh 29 November 1998 di mana duti setem telah dibayar pada 6 Disember 1998 (lihat ms 330H–I). Keterangan yang dikemukakan bagi pihak defendan berkenaan harta Bukit Lancong mencadangkan bahawa harta tersebut telah dihadiahkan kepada SD3 (lihat ms 331 B–C). Oleh itu, dengan menimbangkan segala keterangan yang diberikan, pihak pendakwa tidak dapat membuktikan kesnya sehingga tiada keraguan munasabah.]

Notes

For cases on Prevention of Corruption Act generally, see 4 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1850–1945.

For cases on duty of court at the close of the prosecution's case, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2906–2911.

For a case on indefeasibility of a registered owner, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1886.

Cases referred to

Ahmad bin Salleh & Ors v Rawang Hills Resort Sdn Bhd [1995] 3 MLJ 211
Abdullah Zawawi v PP [1985] 2 MLJ 16 (refd)
Ahmad Tajuddin bin Haji Ishak v Suruhanjaya Pelabuhan Pulau Pinang [1997] 1 MLJ 241 (refd)
Arulpragasan a/l Sandaraju v PP [1997] 1 MLJ 1 (refd)
Arumugam Pillai v Govt of Malaysia [1975] 2 MLJ 29 (refd)
Atley v State of Uttar Pradesh AIR 1955 SC 807 (refd)
Attorney General of Malaysia v Chiow Thiam Guan [1983] 1 MLJ 51 (refd)
Bachan Singh v Mahinder Singh [1956] MLJ 97 (refd)
Bedah bte Hj Osman [1941] MLJ 118 (refd)
Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd [1996] 2 MLJ 12 (refd)
Chan Cheung Yuk-Lin & Anor v GA Harknett [1978] HKLR Part II 123 (refd)
Chan Pean Leon v PP [1956] MLJ 237 (refd)
Comm of Australian Federal Police v Cox (1986) 70 ALR 509 (refd)
Dalip Bhagwan Singh v PP [1998] 1 MLJ 1 (refd)
Haw Tua Tau v PP [1981] 2 MLJ 49 (refd)
Herchun Singh v PP [1969] 2 MLJ 209 (refd)
Heritable Reversionary Co Ltd v Millar [1892] AC 598 (refd)
Jazuli bin Mohsin v PP [1990 2 MLJ 190 (refd)
Johnston Tan Han Seng v PP [1977] 2 MLJ 66 (refd)
M & J Frozen Foods Sdn Bhd & Anor v Siland Sdn Bhd & Anor [1994] 1 MLJ 294 (refd)
Mohd Amin bin Abdullah v PP [1998] 6 MLJ 122 (refd)
Mohd Jalani bin Saliman & Anor v PP [1997] 5 MLJ 551 (refd)
Mohamed Yatin bin Abu Bakar v PP [1950] MLJ 57 (refd)
Narayan v S AIR 1977 SC 183 (refd)
Ng Chwee Poh v PP [1977] 2 MLJ 230, (refd)
PP v Choy Kok Kuan (1959) MLJ 80 (refd)
PP v Foong Chee Cheong [1970] 1 MLJ 97 (refd)
PP v Kothandaraman [1946] MLJ 56 (refd)
PP v Kow Yew Lee @ Ah Kow [1995] 1 CLJ 706 (refd)
Scott v Baker [1969] 1 QBD 659 (refd)
PP v Serindaram [1984] 1 MLJ 141 (refd)
PP v Tiong Ching Heng [1990] 3 MLJ 51 (refd)
Rajinder Kumar v State of Punjab AIR 1966 SC 1322 (refd)
Re Lim Kwang Teik & Ors [1954] MLJ 159 (refd)
Tan Teck Seng v Suruhanjaya Perkhidmatan Pendidikan [1996] 1 MLJ 261 (refd)
Teh Bee v Maruthamuthu [1977] 2 MLJ 7 (refd)
Yeong Ah Chee v Lee Chong Hai & Anor & other appeals [1994] 2 MLJ 614 (refd)

Legislation referred to

Criminal Procedure Code ss 107, 108, 108A, 180, 182A, (iii)
Federal Constitution arts 5, 8, 145(3)
Evidence Act 1950 ss 74, 77, 106, illustration (a), 110, 114, (e), illustration (g)
National Land Code 1965 ss 89, 92
Prevention of Corruption Act 1961 ss 4(a), 25, (1), (a), (2)

Rahim bin Uda (*Saiful Edris bin Zainuddin* and *Mohd Razib Othman* with him) (*Attorney General's Chambers*) for the Prosecution.

Muhammad Shafee bin Abdullah (*WW Cheong* and *K Raja Segaran* with him) (*Shafee & Co*) for the defence.

Abdul Wahab J:

The background

The defendant, Tan Sri Muhammad bin Muhammad Taib, was issued with a notice under the Prevention of Corruption Act 1961 as follows:

Akta Pencegah Rasuah 1961

(Akta 57)

Notis di bawah s 25(1)(a)

Pada menjalankan kuasa-kuasa yang diberikan kepada Pendakwa Raya oleh s 25(1)(a) Akta Pencegah Rasuah 1961 (Akta 57) dan terletakhak pada saya mengikut s 376(iii) Kanun Prosedur Jenayah [NMB Bab 6], saya, Idrus bin Harun, Timbalan Pendakwa Raya, dengan ini menghendaki kamu YAB Tan Sri Muhammad bin Muhammad Taib, No KP 450629-10-5159, yang beralamat di Pejabat Menteri Besar Selangor, Bangunan Setiausaha Kerajaan Selangor, 40000 Shah Alam, Selangor memberi suatu pernyataan bersumpah secara bertulis yang menyatakan satu persatu kesemua harta alih atau tak alih kepunyaan atau yang dimiliki oleh kamu, ejen atau pemegang amanah kamu, dan oleh isteri, anak-anak lelaki dan anak-anak perempuan kamu, dan menyatakan tarikh bila tiap-tiap harta yang dinyatakan satu persatu itu diperolehi sama ada dengan cara pembelian, hadiah, bekues, pewarisan atau sebaliknya pada atau sebelum tarikh penyampaian notis ini.

2 Dan ambil perhatian bahawa pernyataan bersumpah yang tersebut di atas hendaklah diserahkan sendiri atau dengan pos berdaftar kepada saya di alamat yang tersebut di atas dalam tempoh empat puluh lima (45) hari dari tarikh penyampaian notis ini kepada kamu.

3 Dan ambil perhatian selanjutnya bahawa menurut s 25(2) Akta tersebut jika kamu dengan sengaja cuai atau gagal mematuhi syarat-syarat notis ini dalam tempoh yang dinyatakan di dalamnya kamu adalah bersalah atas suatu kesalahan dan boleh, apabila disabitkan, dikenakan denda tidak lebih daripada dua ribu ringgit atau penjara tidak lebih daripada satu tahun atau kedua-dua denda dan penjara tersebut.

Bertarikh pada 10 April 1997.

(Idrus bin Harun)
Timbalan Pendakwa Raya
Badan Pencegah Rasuah
Malaysia

The notice was served on 11 April 1997 upon the defendant who submitted his sworn declaration pursuant to the notice on 26 May 1997. A further declaration was submitted on 30 June 1997.

The prosecution case is that pursuant to investigations by the Anti-Corruption Agency ('ACA'), it was found the defendant had not declared the following land properties registered two each in his and his wife's name respectively:

(1) Lot 1593, Mukim Batang Kali (3 a 0 r 30 p)

(2) Lot 1594, Mukim Batang Kali (3 a 2 r 0 p)

(3) HS (M) 5039 Pt 11100 Bukit Lancong (1.5 a)

(4) HS (D) 142249 Lot 32913 Mukim Kuala Lumpur (557.4 sq m), at 139 Jln Athinahappan.

The defendant was charged with an offence as follows:

> Bahawa kamu, pada 26 Mei 1997 di Pejabat Timbalan Pendakwa Raya, Ibu Pejabat Badan Pencegah Rasuah Malaysia, Persiaran Duta, dalam Wilayah Persekutuan Kuala Lumpur sebagai seorang yang dikehendaki oleh Pendakwa Raya melalui Notis di bawah s 25(1)(a) Akta Pencegah Rasuah 1961 (Akta 57) bertarikh 10 April 1997 untuk mengisytiharkan satu persatu kesemua harta alih atau tak alih kepunyaan atau yang dimiliki oleh kamu, ejen atau pemegang amanah kamu, isteri kamu, anak-anak lelaki dan anak-anak perempuan kamu, telah dengan sengaja tidak mematuhi syarat-syarat dalam Notis tersebut iaitu, kamu dalam pernyataan bersumpah kamu bertarikh 23 Mei 1997 hanya mengisytiharkan harta yang bernilai semasa perolehan berjumlah RM10,815,232.24 dan AUD3,460,000 (nilai semasanya yang dianggarkan oleh kamu sendiri berjumlah RM30,831,306.15 dan AUD1,000,000) dan oleh itu kamu telah melakukan kesalahan di bawah s 25(2) Akta Pencegah Rasuah 1961.

On 7 December 1998, the prosecution proffered an amended charge as follows:

> Bahawa kamu, pada 26 Mei 1997 di Pejabat Timbalan Pendakwa Raya, Ibu Pejabat Badan Pencegah Rasuah Malaysia, Persiaran Duta, dalam Wilayah Persekutuan Kuala Lumpur, sebagai seorang yang dikehendaki oleh Pendakwa Raya melalui notis di bawah s 25(1)(a) Akta Pencegah Rasuah 1961 (Akta 57) bertarikh 10 April 1997 untuk mengisytiharkan satu persatu kesemua harta alih atau tak alih kepunyaan atau yang dimiliki oleh kamu, ejen atau pemegang amanah kamu, isteri kamu, anak-anak lelaki dan anak-anak perempuan kamu, telah dengan sengaja tidak mematuhi syarat syarat dalam notis tersebut iaitu, kamu dalam pernyataan bersumpah kamu bertarikh 23 Mei 1997 telah tidak mengisytiharkan semua harta-harta seperti yang dikehendaki dalam notis berkenaan, maka dengan itu kamu telah melakukan kesalahan di bawah s 25(2) Akta Pencegah Rasuah 1961.

Section 25(1)(a) of the Act provides:

> (1) In the course of any investigation or proceedings into or relating to an offence under this Act, or any prescribed offence, by any person, the Public Prosecutor may, notwithstanding anything in any other written law to the contrary, by written notice —
>
> (a) require any such person to furnish a sworn statement in writing enumerating all movable or immovable property belonging to or

A possessed by the person, his agent or trustee, and by the spouse, sons and daughters of the person, and specifying the date on which each of the properties enumerated was acquired whether by way of purchase, gift, bequest, inheritance or otherwise; ... .

(2) Every person to whom a notice is sent by the Public Prosecutor under sub-s (1) shall, notwithstanding the provisions of any written law or any B oath of secrecy to the contrary, comply with the terms of the notice within such time as may be specified therein; and any person who wilfully neglects or fails so to comply shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding two thousand ringgit or to imprisonment for a term not exceeding one year or both.

C *The evidence by the prosecution*

The evidence adduced by the prosecution was direct and to the point.

The penolong pentadbir tanah daerah Ulu Selangor, En Mohtou @ Mohtar bin Hani (SP1) gave evidence that Lot 1593 and Lot 1594 Mukim Batang Kali was transferred to Muhammad bin Muhammad Taib (I/C D No 2693999) on 2 July 1996 by one Mohd Isa bin Md Yassin and one Kamaruddin bin Haji Mohd Noor respectively. SP1 testified that according to the records there has been no dealings or caveats or presentations filed in respect of the two lots.

The penolong pegawai daerah Petaling, En Misri bin Haji Idris (SP2) E gave evidence that the property known as HS (M) 5039 was transferred to Asbi Rohani bte Asnan (I/C No 2734946) on 27 December 1989 and has remained in her name since. There has been no dealings, presentation or transfer to any person to date. This witness was recalled for cross-examination the next day where he gave evidence that a consent to transfer for HS (M) 5039 was issued on 7 July 1998.

F

The penolong pentadbir tanah Wilayah Persekutuan, En Ibrahim bin Mat Sin (SP3) gave evidence that the property HS (D) 142249 PT 32913 in the Mukim of Kuala Lumpur was transferred to Asbi Rohani bte Asnan (I/C No 2734946) on 28 October 1991. It is a residential property and was charged to Lee Wah Bank on 13 March 1992. That was the only dealing G upon the property which remains in the name of the said transferee without any caveat.

The pegawai tadbir agama, Pejabat Agama Slim River, En Ahmad Nizam bin Amiruddin (SP4), gave evidence that one Muhammad bin Haji Muhammad Taib holder of I/C No 2693999 married one Asbi Rohani bte Asnan, holder of I/C No 2734946 on 7 April 1973.

H

Dato Idrus Harun (SP5), who at the relevant point in time was the deputy public prosecutor at the Anti-Corruption Agency gave evidence that he issued the notices (P10A and P10B) in Bahasa Malaysia and in English under s 25 (1)(a) of the Prevention of Corruption Act 1961 addressed to the defendant dated 10 April 1997 and received a sworn declaration (P12) I from the defendant on 26 May 1997. He forwarded the declaration to one En Basri bin Idris on the following day. The document was sworn before a commissioner for oaths. In addition he received a second declaration (P13) on 30 June 1997.

A penolong kanan penguasa, Anti-Corruption Agency, En Mohd Fauzi Haji Muhammad (SP6) gave evidence that he served the notices P10A and P10B upon the defendant on 11 April 1997. He had read the notices to the defendant, who after acknowledging that he understood, was asked to acknowledge receipt. The defendant acknowledged in writing as at P11A and P11B and he signed also at P11C and P11D. He identified the defendant as the person the notice was addressed to and upon whom he served the notice and obtained acknowledgment from.

A commissioner for oaths, En Haron bin Hashim (SP7), gave evidence that the defendant came to his office on 23 May 1997 to execute a sworn declaration before him. He identified the defendant and the document as exh P12. The witness signed as commissioner for oaths on the declaration and the attachments to the declaration.

Another commissioner for oaths, En Zainal bin Omar (SP8) gave evidence that the defendant came to his office to execute a sworn declaration on 9 June 1997. He identified exh P13, the signature of the defendant made before him, his own signature, and the date of excretion.

The pegawai pendaftar, Jabatan Pendaftaran Malaysia, En Mustafar bin Abd Wahid (SP9), gave evidence that an Anti-Corruption Agency officer by the name of Raship bin Ahmad, came on 4 August 1998 to obtain copies of identity cards Nos 450629-10-5159 and 421129-08-5586. The records are in his possession. He produced P14 in respect of the first identity card, which was issued in the name of Muhammad bin Muhammad Taibin The old number was, according to his records, 2693999. The second identity card was issued to one Asbi Rohani bte Asnan for which the previous number was 2734946. This was produced and marked P14.

The prosecution called no further witnesses and made available all its other witnesses to the defence.

In terms of primary evidence the prosecution has proved that the defendant and his wife are the registered owners of two each, respectively, of the properties. No further evidence of ownership was adduced. It can be seen therefore that the prosecution case relies heavily on the fact that the properties were registered in the names of the defendant and his wife, Asbi Rohani bte Asnan, at the time of the service of notice, and on that ground the defendant ought to have declared the properties in his declaration.

On submission of no case to answer

Preliminary

The defence has submitted that the prosecution has failed to make out a prima facie case under s 180 of the Criminal Procedure Code (FMS Cap 6) ('CPC').

Section 180 as amended and applicable after January 1997 provides as follows:

Procedure after conclusion of case for prosecution

(i) When the case for the prosecution is concluded, the Court shall consider whether the prosecution has made out a *prima facie* case against the accused.

(ii) If the Court finds that the prosecution has not made out a *prima facie* case against the accused, the court shall record an order of acquittal.

(iii) If the court finds that a *prima facie* case has been made out against the accused on the offence charged the court shall call upon the accused to enter on his defence.

Prior to the amendment, the prosecution was required to make out a case which if unrebutted would warrant a conviction. The background has been well summed up by KC Vohrah J in *Mohd Amin b Abdullah v PP* [1998] 6 MLJ 122. The effect has been to do away with the more rigorous test of credibility applied in *Arulpragasan a/l Sandaraju v PP* [1997] 1 MLJ 1 (FC) and to adopt the lower standard of proof at the end of the prosecution case applied in *Haw Tua Tau v PP* [1981] 2 MLJ 49 (PC). Some explanation is merited. It has been said that the approach in *Arulpragasan* calls for a maximum evaluation of the prosecution evidence while the approach in *Haw Tua Tau* calls for a minimal evaluation. To do justice to these two cases, it must be noted that the term was used in *Arulpragasan* in reference to 'applying a more rigorous test of credibility'. The view in *Haw Tua Tau* and adopted in the amended s 180 is to reserve the application of the more rigorous test of credibility to the end of the case; while in the intermediate stage at the end of the prosecution case, the applicable test is whether there is evidence not otherwise incredible in respect of the ingredients of the offence charged. The evidence not otherwise incredible is assumed to be credible, to be reviewed at the end of the trial together with any evidence adduced by the defence. See *Dalip Bhagwan Singh v PP* [1998] 1 MLJ 1 (FC).

The court, acting under s 180, cannot act capriciously but must consider whether there is evidence not otherwise incredible adduced in respect of the ingredients of the offence. To borrow the words of Peh Swee Chin FCJ in *Dalip Bhagwan Singh*: 'In concluding on the sufficiency of such evidence to satisfy the said ingredients, there will be sometimes a lot of rejection of irrelevant or inadmissible evidence'. The evaluation at the end of the prosecution case must therefore, as always, be conducted with utmost care and attention as it involves liberty and property of the accused, inasmuch as he has to remain to defend himself, even perhaps under remand, and put to the trouble and expense of further defending himself. Acting judicially, the court cannot however embark on its own critical evaluation of the evidence, but must, unless the point is obvious, primarily deal with the particular issues raised in the submissions of no case to answer.

Applying these principles I turn now to consider the areas of issues raised in the defendant's submission of no case to answer. I shall approach the questions in this manner. The operative words of a charge under s 25(2) of the Prevention of Corruption Act 1961 is that he 'wilfully neglects or fails to so comply' with a notice under s 25(1) served upon him. The issue that he has neglected or failed to comply arises only if the properties in question,

moveable and immovable, that he has failed to declare, are properties belonging to or possessed by him, his agent or trustee, and by his spouse, sons and daughters. But before proceeding on these two questions, the first question is whether the notice is issued in the course of any investigation or proceeding relating to an offence' under the Act or any prescribed offence.

The notice was issued 'in the course of any investigation or proceeding relating to an offence' under the Act or any prescribed offence

The offence with which the defendant was charged is contained in s 25(2) which reads as follows:

> Every person to whom a notice is sent by the Public Prosecutor under sub-s (1) shall, notwithstanding the provisions of any written law or any oath of secrecy to the contrary, comply with the terms of the notice within such time as may be specified therein; and any person who wilfully neglects or fails so to comply shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding two thousand ringgit or to imprisonment for a term not exceeding one year or both.

It was argued that since the DPP is empowered to issue the notice in the course of any investigation or proceeding to any offence under the Act or any prescribed offence, the fact the notice was issued in the course of any investigation or proceeding was a necessary part of the prosecution evidence, and since the prosecution has failed to adduce any evidence in this regard, the prosecution case must necessarily fail.

Cross-examination as to investigation was led only to this extent:

Q: You have been in service for 18 years and [a] very experienced DPP: you agree an investigator, if upon receipt of this declaration — his duty is to go back to the defendant to ask him why these 4 properties had not been declared to enable him to explain?

A: Benar.

Q: You do not know whether the investigator has done that?

A: Benar.

In re-examination, SP5 said he was not directly involved in investigations, which is conducted by another division of the Anti-Corruption Agency, and was not in a position to enlighten the court as to investigation in this case. The investigation officer himself was not called.

The defence argued that the fact of an investigation or proceeding is an ingredient of the offence. I would respectfully differ from *PP v Mohd Idrus Hj Mohamad* (Arrest Case No SA 1/74) Sessions Court, Kuala Lumpur (Siti Norma Yaakob, President); *PP v Kow Yew Lee @ Ah Kow* [1995] 1 CLJ 706 which had proceeded on that basis. While sub-s (2) refers to a notice by the Public Prosecutor under sub-s (1), the offence in sub-s (2) is of wilful neglect or failure to comply with the notice issued by the Public Prosecutor.

It is not questioned in this case that a notice purporting to be issued under s 25(1) was served upon the defendant. The deputy public prosecutor who issued the notice, Dato' Idrus b Harun (SP5), was called to

give evidence. He produced the notice. The notice clearly asserted that it was issued in exercise of the power under s 25(1)(a). There is no other evidence on the record suggesting that there was no investigation. No question was put to the witness in cross-examination that the notice was improperly issued. It is clear then there is evidence of assertion the notice is issued in the course of an investigation or proceeding. In such a case, *Abdullah Zawawi v PP* [1985] 2 MLJ 16 is inapplicable.

The prosecution argued that the court may presume that the issue of the notice was regularly made in accordance with s 25. Section 114(e) of the Evidence Act 1950 provides:

> (e) that judicial and official acts have been regularly performed.

The application of presumptions have always been a matter of much concern and debate. There is a multitude of seemingly conflicting cases. To my mind a substantial part of the difficulty of applying s 114(e) can be avoided by being less obsessed with the wording of s 114(e). The proper reference to the provision is s 114 Illustration (g). Illustration (g) is exactly what it says, an illustration. It is not an explanation. It is not a definition. It cannot derogate from the meaning of s 114 itself which reads as follows:

> Court may presume existence of certain fact
>
> The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.

The effect of s 114 is to make it clear that the courts must use their own common sense and experience in weighing the evidence before it in arriving at a conclusion as to what is likely to have happened in a particular case. The court has to decide whether or not to make a presumption based upon the evidence before it. The court is not bound to make the presumption. It is a decision that can only be made according to the circumstances of the particular case. See *Sarkar on Evidence* (14th Ed) vol 2 p 1509 'May Presume', p 1526ff. The presumption can of course be displaced by evidence: *Narayan v S* AIR 1977 SC 183.

Failure to call the investigating officer is in my view, considering the assertion in the notice, is not fatal (see *Mohd Jalani bin Saliman & Anor v PP* [1997] 5 MLJ 551). It cannot be said there is a gap in the prosecution case and it cannot therefore be a basis to conclude the prosecution has on that ground failed to prove its case: *Jazuli bin Mohsin v PP* [1990 2 MLJ 190. Failure to adduce the first information report is also not fatal: *PP v Foong Chee Cheong* [1970] 1 MLJ 97. Indeed unless a first information report is produced in relation to supporting or attacking the credibility of a complainant, often its prejudicial value far outweighs its probative value as evidence.

In *Scott v Baker* [1969] 1 QBD 659, it was held that an offence of driving with excess of alcohol in his blood was not established unless it was shown that the specimen of blood was obtained in accordance with another s dealing with obtaining the blood sample. With respect the case is

distinguishable in that the relevant s provided for the detailed preconditions and procedure for the taking of the sample. There is no similar provision in s 25(1), and presuming that the DPP was satisfied there was an investigation is not the 'going a very long way...' involved in making such presumption in *Scott v Baker*.

It is undisputed by the prosecution that it is a mandatory requirement of s 25 that there be a prior or on-going investigation before the DPP may issue a notice. Given that: (i) it was not put to the witness SP5 that there was no prior or ongoing investigation before he issued the notice; (ii) that in the notice SP5 who is an experienced DPP had asserted that the notice was issued in exercise of his power under s 25(1)(a); (iii) that it is most unlikely any person would issue such notice irresponsibly particularly upon the defendant who is a Menteri Besar; and (iv) there being nothing in evidence before the court that suggests there was no prior or ongoing investigation, this court is of the opinion that, having regard to the common course of human conduct, public and private business in their relation to the facts adduced in this particular case, it is likely that there was prior or ongoing investigation, and in all the circumstances of this case, the court may safely and justifiably make the rebuttable presumption that there was in fact an investigation.

The Hong Kong case of *Chan Cheung Yuk-Lin & Anor v GA Harknett* [1978] HKLR Part II 123 was cited before me. In my opinion, the case is not inconsistent with the view above. In that case, the plaintiff had been served with a similar notice. The step that he correctly took was to initiate an action to set aside the notice. No similar action has been taken in this case, and there is nothing therefore to vitiate the notice.

To summarize, unless the notice, which purports to be issued pursuant to the powers under s 25(1)(a), has been set aside, it must be presumed at this stage of the prosecution case, that the act of the DPP in issuing the notice, had been regularly performed and the notice regularly issued, ie in the course of an investigation or proceeding. Indeed, although it is not absolutely necessary for the DPP to have been called (see *PP v Tiong Ching Heng* [1990] 3 MLJ 51) he was called. The presumption under s 114 illustration (e) has been applied in *Re Lim Kwang Teik & Ors* [1954] MLJ 159; *PP v Kothandaraman* [1946] MLJ 56; *PP v Choy Kok Kuan* (1964) 3 MC 200; *PP v Serindaram* [1984] 1 MLJ 141 and others. The notice itself having been produced, and stating clearly that it was issued pursuant to s 25(1)(a), it is sufficient evidence of the existence of an investigation, and it not necessary to proceed behind the notice unless there is evidence suggesting it was improperly or irregularly issued.

The properties were properties 'belonging to' the defendant or his wife

The only evidence advanced for this purpose by the prosecution is that the land properties were registered in the names of the defendant and his wife. The National Land Code Act 56 of 1965 provides that:

> 89 Conclusiveness of register documents of title
>
> Every register document of title duly registered under this Chapter shall, subject to the provisions of this Act, be conclusive evidence —

A (a) that title to the land described therein is vested in the person or body for the time being named therein as proprietor; and

(b) of the conditions, restrictions in interest and other provisions subject to which the land is for the time being held by that person or body, so far as the same are required by any provision of this Act to be specified or referred to in that document.

B 92 Indefeasibility of final title, and rights of dealing, etc

(1) The alienation of state land to any person or body under final title shall confer on that person or body a title to the land which shall be indefeasible as provided in Part Twenty.

(2) The rights exercisable by any person or body to whom State land has C been alienated under final title shall include the following —

(a) the right (subject to the provisions of this Act and to any restriction in interest to which the land is for the time being subject) to sub-divide or partition the land, or amalgamate it with other land, in accordance with the provisions of Chapters 1 to 3 of Part Nine;

D (b) the right (subject as aforesaid) to sub-divide any building thereon in accordance with the provisions of Chapter 4 of Part Nine;

(c) the right (subject as aforesaid) to effect transfers, leases, charges, surrenders, and any other dealings permitted under division IV; and

E (d) the right (subject as aforesaid, and subject also to the provisions of his personal law and of any other law for the time being in force relating to the disposition or devolution of property on death) to dispose of the land, or any undivided share therein, by will.

F These two sections create a very strong presumption in our law that the registered proprietor, which term in its ordinary meaning means 'owner', is the owner of the property registered in his name. He is described as the owner of a registered title. 'Title' means that which constitutes a just cause of exclusive possession, that which is the foundation of ownership of property, real or personal. It is a right, as in 'a good title' to an estate, or G even for that matter an imperfect title.

In the language of the National Land Code, the registered proprietor has an indefeasible title against the whole world, and the register is everything: *Bedah bte Haji Osman* [1941] MLJ 118; *Teh Bee v Maruthamuthu* [1977] 2 MLJ 7 (FC). However although the title is H indefeasible, it has been authoritatively determined in the courts that equitable rights, even though not registrable, may be maintained against the registered owner. Such adverse claims apply primarily as an issue between the owner of the equitable interest and the registered proprietor. *Heritable Reversionary Company Ltd v Millar* [1892] AC 598; *Commissioner of Australian Federal Police v Cox* (1986) 70 ALR 509; *M & J Frozen Foods Sdn* I *Bhd & Anor v Siland Sdn Bhd & Anor* [1994] 1 MLJ 294 (SC) are illustrative of the recognition of the equitable interest. Equitable interests depend upon the equitable jurisdiction of the courts for their protection. The National Land Code does not itself recognize trusts. As against the world at large, the National Land Code recognizes only the registered

proprietor as being entitled to exercise the rights of ownership to deal with the land (see *Bachan Singh v Mahinder Singh* [1956] MLJ 97). A

The concept of indefeasibility then in this context primarily means that the burden is upon the person raising an adverse claim to prove his right. The ownership of a registered proprietor is therefore not entirely irrebuttable. B

Further, the indefeasible title carries with it the right of exclusive possession. The registered proprietor is therefore presumed to be in possession unless the contrary is proven. s 110 of the Evidence Act itself provides that where a person who is in possession claims he is not the owner, the burden is upon him to prove he is not the owner. Section 110 of the Evidence Act 1950 provides: C

> The burden of proof as to ownership
>
> When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving he is not the owner is on the person who affirms he is not the owner.

D

As the registered proprietor, and holder of the title, which by law includes the right of exclusive possession, s 110 operates to shift the burden upon the defendant to prove that he is not the owner. A presumption, other than a presumption against the accused in a criminal action, imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence. In criminal cases, in E view of s 182A of the CPC which requires proof by the prosecution 'beyond reasonable doubt' simply means the defence has to raise only a reasonable doubt.

It is clear therefore that the law in Malaysia presumes the registered proprietor to be the owner of the land registered in his name and for all F purposes the land belongs to him. But the presumption is not irrebuttable. The party seeking to rebut the presumption must prove his case. In the circumstances of this case the burden lies upon the defendant to show that while he is the registered proprietor, the right of beneficial ownership, for want of a better term, lies with another in order to dispel the strong presumption that the properties belong to him and his wife G respectively.

In other words the mere fact that the law envisages the existence of a possible equitable interest maintainable in personam against the registered proprietor is insufficient to raise any doubt. There must be some evidence to prove it.

H

The property known as 139 Jln Athinahappan was stated in the defendant's sworn declaration to have been sold. A sale and purchase agreement dated 29 November 1996 was exhibited and stamp duty appear to have been paid on 6 December 1996. Clause 2 of the agreement provides that the purchase price of RM1.8m shall be paid within 3 months from the date of the agreement, upon which per cl 3 the vendor would deliver to the I purchase the issue document of title and a photocopy of the current quit rent receipt of the said property, and per cl 13, vacant possession was to be given at the same time.

A Although the 139 Jln Athinahappan sale transaction may arguably have been proved by the fact that there was a sale and purchase agreement dated 29 November 1996, certain questions remain open.

It was asserted in the sworn declaration that the purchaser had paid in full. Now it appears the property was registered in the name of the wife. Yet it would appear payment made was to the account of the defendant, and the house being built and paid from part of the proceeds of the sale, is in the name of the defendant. The photocopy of the statement from the Bank does not show when or if the full amount was paid. There being no indication when the payment was made, the contractual alternative of a termination of the transaction remains as it appears on the face of the agreement itself. The declaration was of a transaction entirely between members of the family of the defendant, with inadequate detail as to the execution of its terms. At the prosecution stage of the trial, the answers to these questions remain obscure.

In cross-examination SP2 produced evidence of an approval to transfer the property described as HS (M) 5039 at Bukit Lancong. The approval however was dated 7 July 1998. On the face of it, it is of little relevance, at this point, to the charge in respect of the notice and the sworn declaration made pursuant thereto in mid-1997. There was no explanation as to the Batang Kali properties elicited from the prosecution witnesses.

It was argued that if only the investigators had asked the defendant about these properties he would have explained. It is unnecessary to speculate, nor will it serve any useful purpose. Even if an explanation had been given and the explanation was not believed as bona fide, the charge could be maintained and it is for the court to determine if at least a reasonable doubt is raised after defence testimony and other evidence, if any, is tested in cross-examination.

There is no evidence of possession of the properties by other persons such as would raise the argument, relying on s 110 of the Evidence Act 1950, that such person in possession has to show he is not the owner. No such suggestion was raised in cross-examination of prosecution witnesses. There is nothing therefore to suggest that the defendant and his wife were not the owners of the properties at Batang Kali, 139 Jln Athinahappan and Bukit Lancong.

In the circumstances, the fact the properties remain registered in the names of the defendant and his wife respectively, is strong presumption the properties belong to them, and the burden shifts upon the defendant to show otherwise by adducing sufficient evidence to raise, in the context of a trial on a criminal charge, a reasonable doubt.

The next question is whether he wilfully neglected or failed to declare the properties.

The defendant 'wilfully neglects or fails' to declare the four properties

That the mental element or mens rea is an essential element is an established principle in our law. It is derived from the maxim *Actus non reum facit, nisi mens sit rea* (An act does not make a person guilty, unless the intention be also guilty). The requirement of this mental element can only

be displaced, after strict interpretation thereof, by clear and unambiguous language in the relevant legislation. As to proof of intention generally I would respectfully refer to the words of Thomson J in *Chan Pean Leon v PP* [1956] MLJ 237 at pg 239:

> Intention is a matter of fact which in the nature of things cannot be proved by direct evidence. It can only be proved by inference from the surrounding circumstances. Whether these surrounding circumstances make out such intention is a question of fact in each individual case. If a watch is in my pocket then in the absence of anything else the inference will be clear that I intend to deal with it as if it were my own and accordingly I am in possession of it. On the other hand, if it is lying on a table in a room in which I am but which is also frequently used by other people then the mere fact that I am in physical proximity to it does nor give rise to the inference that I intend to deal with it as if it belonged to me. There must be some evidence that I am doing or having done something with it that shews such an intention. Or it must be clear that the circumstances in which it is found shew such an intention.

Intention in 'neglects or fails' means that the neglect or failure was done intentionally or knowingly, and not by accident or inadvertence. The element of willfulness adds to the knowledge or intention something more. This was dealt with in *Ng Chwee Poh v PP* [1977] 2 MLJ 230 at p 237:

> The term 'wilfully' has been considered by the trial judge and in his grounds of decision he has accurately set out the law. He said:
>
> > 'This term (wilfully) has been discussed fully and defined in several decided cases. In the case of *Senior* [1899] 1 QB 283 at p 290, Lord Russell of Killowen described the term thus; 'wilfully means that the act is done deliberately and intentionally, not by accident or inadvertence, but so that the mind of the person who does the act goes with it'. This interpretation was adopted in the case of *AB Tamboli v Agent, GIP Railway Company, Bombay* AIR 1928 PC (Bom) 24 at pp 26-27. Again, in the case of *Iannella v French* (1967–68) 41 ALJR 389 at p 393, Barwick CJ, stated, '... "wilful" connotes intention and knowledge: ...', and further in his judgment therein, that, 'the word contains in its connotations elements of purpose'. Windeyer J, also in the same case, at p 399, expanded on this interpretation of the term in the words, 'If the word "wilfully" be given the meaning and effect that I think it has in this context, then an honest mistake as to the existence of any element essential to the offence is a defence'. He also referred to the judgment of Napier CJ, in the case of *Davies v O'Sullivan (No 2)* [1949] SASR 208, wherein it was stated: 'The natural meaning (of the term "wilfully") ... is that the act was done intentionally, not by accident or inadvertence, but so that the mind or will of the actor goes with the act ...' , with which he expressed his agreement. In referring to several other decisions, including that of Fullager J in *Jackson v Butterworth* [1946] VLR 330, Windeyer J added that: 'That word "wilfully" does not stand alone. Its importance is in the meaning which it gives to its context'.

Mr Newey says that it is very important in assessing the issue of mens rea to recognise the personality of the appellant and the background of the case. From the evidence adduced by the prosecution the following facts emerged. The appellant is wholly illiterate in English and is almost totally illiterate in Chinese and can only read and write a few words. He knows his numerals but he places his decimals at the wrong places. He has no grasp or understanding

A of accounts and can only do simple additions and subtractions. The appellant and his father had a windfall and they went into business together under the style of Poh Hua Granite Quarry Co. The organization of this firm was elemental and the business was carried on in a thoroughly unbusinesslike fashion. The firm at first had no banking account and partnership money was paid into the appellant's personal account. The accounting aspects of the firm
B were also elemental. The only accounts which the appellant conceived were needed were accounts showing who owed money and when debts were paid. Hence he had from the beginning the two small notebooks exhs P83 A and B and later the two ledgers exhs P86 and P87. In each of these exhibits were recorded the sales of granite, the date of such sales, the name of the purchasers and the date and amount of payment of the debts. The handwriting in these
C exhibits is the handwriting of different persons and were written up by some clerk in the office from the sales vouchers.

'Wilfully' in s 25(2), to my mind, imports into the intention or knowledge inherent in 'neglects or fails' the element of contumacious deliberateness. However, willfulness like intention or knowledge cannot be evidenced
D directly and is thus an inference to be drawn from facts that are proved. See *Rajinder Kumar v State of Punjab* AIR 1966 SC 1322.

Now, the property known as 139 Jln Athinahappan was in fact mentioned in the defendant's declaration as having been sold. The mention was made in relation to explanation of the source of the funds in a bank account and for the construction of a house in Kelana Jaya. I have
E considered whether declaring 139 Jln Athinahappan amounts to requiring a double declaration since the defendant has declared the payment in the bank account. Superficially it appears to be so.

However, the declaration under s 25 is not a statement of the declarant's net worth, in which the issue of double declaration is particularly
F relevant. s 25 is a mechanism to require a declaration of all of his properties, legal or equitable, moveable or immovable and an explanation as to when and how it was acquired. For that matter, s 25 makes no distinction whether the property is lawfully or unlawfully obtained. Even stolen property, to which he cannot be said to have title to, must be declared and explained. Section 25 is intended as an aid to investigation by setting out all properties
G belonging to or possessed by the person as required by the terms of the notice. Given the strong presumption of ownership of a registered proprietor, the property itself should ordinarily be declared with the explanation it has been sold.

If that were done the declaration as to 139 Jln Athinahappan could then
H be referenced to the bank account into which the payment was made. An explanation and elaboration as to what happened to the sale transaction is warranted in the sworn declaration. As it is, although the declaration of the bank account indirectly asserted the property was sold for RM1.8m, such declaration as to 139 Jln Athinahappan, if it could be termed as such, did not show fully how or if and if so when the purchase price was paid. The
I copy of bank statement showed the balances for the month of April 1997 only. In failing to do that, there was incomplete declaration as to 139 Jln Athinahappan. In so failing the defendant did not declare, within the terms of the notice, how it was acquired.

As to the properties at Batang Kali and Bukit Lancong, there was no mention at all in the sworn declaration submitted on 26 May 1997. A

It is clear then there was a neglect or failure to declare these properties. But to constitute an offence under s 25(2), the neglect or failure must be wilful.

It was argued the neglect or failure to declare was not wilful because in the defendant's or his wife's mind the owner is some other person. In this case, it seems clear from the line of defence submission that there was a conscious decision not to declare, although in the belief that the property no longer belongs to him or his wife. There is no suggestion of forgetful inadvertence. B C

Counsel for the defendant had also argued that the prosecution did not show any motive for the defendant neglecting or failing to declare the four properties. It is trite that motive is generally irrelevant in our law. If he falls within the definition of murder, it is irrelevant that the person committing murder has no motive or that the motive is ending the suffering of a terminally ill patient. In *Atley v State of Uttar Pradesh* AIR 1955 SC 807, it was clearly explained that while motive may lend additional support to the evidence adduced, its absence does not mean a contrary conclusion but means only that the evidence available has to be more closely examined. D

To my mind, when a person is aware of the property, and these are not inconsiderable properties, the ordinary inference when he neglects or fails to declare the properties is that he wilfully does so. At the very least it can be said that prima facie the defendant had wilfully committed the act of having neglected or failed to declare the property and the burden is upon the defendant to explain and be cross-examined thereon. To apply any other interpretation of s 25 would render it impotent as it would open the door to claims that a property was not declared because in his mind the property was no longer his or that it belonged to another person. E F

To summarize, a mere claim in cross-examination or submission that a sum is payment for a sale of one's property, without evidence the money allegedly received did indeed come from the purchaser, particularly when added to the fact the actual legal transfer was not effected coupled with the fact that the transaction is an internal family, close friend or loyal employee transaction, would in the ordinary course of nature raise more questions than it answers. Similarly a mere suggestion in cross-examination and submission that a property has been sold or gifted away, where the value as in this case is not insignificant, is not sufficient to refute the inference from the character and the circumstances that the act suggests that the defendant wilfully neglected and failed to declare the properties. G H

Such a claim must be well-founded and supported by some evidence. Otherwise it may well be that the transferee is holder of a legal title holding in trust for the declarant. Thus the mere fact of transfer may not necessarily be a complete answer. Since whether the act is not wilful is something especially within the knowledge of the defendant, s 106 of the Evidence Act 1950 is relevant. It provides as follows: I

Burden of proving fact especially within knowledge

When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

Illustrations

(a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.

(b) A. is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him.

Given the evidence adduced and the defence now advanced, illustration (a) above would shift the burden upon the defendant to prove by some evidence that there was some other intention.

Counsel for the defendant had argued that requiring the defendant to declare properties belonging to his wife as being unduly harsh and arbitrary and that the s therefore to that extent violates arts 5 and 8 of the Federal Constitution. Counsel cited *Tan Teck Seng v Suruhanjaya Perkhidmatan Pendidikan* [1996] 1 MLJ 261 (CA) and *Ahmad Tajuddin bin Hj Ishak v Suruhanjaya Pelabuhan Pulau Pinang* [1997] 1 MLJ 241 (CA). Nothing in these cases however suggest that Parliament cannot in the Prevention of Corruption Act 1961 enact s 25. The Court in such case would apply the law as it stands: *Attorney General of Malaysia v Chiow Thiam Guan* [1983] 1 MLJ 51; *Arumugam Pillai v Govt of Mlalaysia* [1975] 2 MLJ 29 (FC). It would be up to the DPP under s 25 to decide whether the circumstances require that the defendant be required to declare the properties belonging to him only or to include that of his wife: see *Johnston Tan Han Seng v PP* [1977] 2 MLJ 66.

Upon a maximum evaluation of the evidence adduced, I find that the prosecution has made out a prima facie case against the defendant on the offence charged and in accordance with s 180(iii) of the CPC, I call upon the defendant to enter on his defence.

The defence

The defendant (SD1) has elected to give evidence on oath. He gave evidence in respect of the four properties that form the subject of the charge against him. He said the properties in Batang Kali which were in his name, were sold to one Kamarudin bin Ahmad; 139 Jln Athinahappan was sold to his brother Dato' Raduan bin Md Taib by his wife, and the Bukit Lancong property was gifted away by his wife to his former driver. The evidence adduced is as follows:

(i) The 139 Jln Athinahappan property

The fact of the sale of 139 Jln Athinahappan to Dato' Raduan bin Md Taib was supported by the production of a sale and purchase agreement dated November 29, 1996 for the sum of RM1.8m and upon which stamp duty was paid on December 6, 1996. The defendant also produced a certified bank statement showing the payment of RM 1.6m into his account in

January and February 1997. It would therefore appear the purchaser had performed all he had to perform to acquire a full beneficial interest in the 139 Jln Athinahappan property. All that remained in his wife as registered proprietor is the shell of title with beneficial ownership in another person.

Dato' Raduan bin Md Taib (SD5) and Puan Sri Asbi Rohani bte Asnan (SD2) gave evidence supporting the defendant's evidence.

The fact the agreement for the 139 Jln Athinahappan property was signed on 29 November 1996 and particularly because stamp duty on the agreement was paid on 6 December 1996, well before the notice under s 25 was served upon him shows strongly that the transaction was unlikely to have been done with a view to avoiding declaring the 139 Jln Athinahappan property. The fact full payment was made by February 1997 thus explains why he did not declare the 139 Jln Athinahappan property, but had declared the sum received instead. Having executed all necessary documents and received full payment by February 1997, the defendant's wife had no further beneficial interest in the property as such.

Although Puan Sri Asbi (SD2) and Dato' Raduan Md Taib (SD5) were cross-examined at length, their testimony was not shaken. They had answered the questions with calm and there was no evidence of any contradictions or distress as would suggest not telling the truth honestly. The prosecution did not produce any evidence in rebuttal. It must be accepted therefore that the transaction in respect of the property is bona fide and SD2 no longer had any beneficial interest in this property.

(ii) Bukit Lancong land

According to the defendant this land was gifted away to his former driver Rohmat bin Kasmawi (SD3). The latter, having served as his driver since 1986 when he became menteri besar, had a heart attack in mid-March 1997. While SD3 was in the Selangor Medical Centre, the defendant's wife, after discussing with the defendant, told Rohmat that she would give him the Bukit Lancong land as a gift.

The defendant's wife (SD2) confirmed that they had agreed to gift the land to Rohmat. According to her, Rohmat came to her house on 2 April 1997 with the Form 14A which she signed, and handed to him the certificate of title.

Rohmat's version was more detailed. He gave evidence he had a heart attack on 12 March 1997 and was in the Selangor Medical Centre for 12 days. While he was in hospital, the defendant and his wife had informed him they would give him something but he was not very sure what it was. He was discharged at the end of March. He had gone to their official residence where he was informed of the gift of the Bukit Lancong land. He was given the certificate of title. After that he went to the Klang Land Office to obtain the Form 14A. Then he went to see SD2 who filled in the name and ticked the part marked 'no consideration'. Then on 2 April, he went to Kamarudin and Partners where he saw a clerk name Asmah who typed in the details. Rohmat had explained he had contacted Kamarudin for assistance and was told to see Asmah if he was not in. This was confirmed by Kamarudin. That same day he went back to SD2 for her signature.

A Having obtained the signature, Rohmat did not pursue the matter because of his health and only in 1998 he went to the land office in Petaling where he was informed that a consent to transfer was required. An application was prepared and executed before a commissioner for oaths on 9 July 1998. Consent to transfer was given on 12 September 1998. After that he had contacted Kamarudin but he was not available. Later he met
B Mr. Ganaeswaren (SD6), an advocate and solicitor. Mr Ganaeswaren confirmed he had the parties execute another Form 14A for the Bukit Lancong land since the date 2 April 1997 would involve a penalty and in any case he had to be sure the parties execute the Form 14A in front of him.

The evidence adduced on behalf of the defendant in respect of the
C Bukit Lancong property indicates that there was a gift of the Bukit Lancong land to Rohmat bin Kasmawi. As with the evidence as to the 139 Jln Athinahappan property, the testimony of the defence witnesses Rohmat bin Kasmawi (SD3) and Kamarudin bin Ahmad (SD4) withstood cross-examination without any evidence of inconsistency or contradiction. No evidence to contradict their testimony was produced by the prosecution.

D There is therefore at least some credible evidence that the defendant's wife had parted with the beneficial ownership of the properties at 139 Jln Athinahappan and at Bukit Lancong. Such evidence tends to show that although the property was registered in the name of his wife, she had parted with all beneficial interest in the said properties.

E (iii) Batang Kali lands: Lot 1593 and Lot 1594

The defendant testified that the two Batang Kali properties had been offered for sale to him by the owners, the land being in the constituency that he is the Ahli Dewan Undangan Negeri, and being good properties, he had agreed to purchase the said lands at market price for RM364,000. He
F explained in evidence how it was acquired, that RM200,000 was the advance payment from the sale of 139 Jln Athinahappan and RM169,860 for balance and disbursements being an arrangement with his brother. His brother Dato Raduan bin Md Taib (SD4) confirmed advancing the sums as stated.

G The defendant's explained that he had not declared the lands because he has sold it to the lawyer who dealt with the transaction, one Kamarudin bin Ahmad (SD4). He said he sale price was RM464,000. Kamarudin said that the defendant had agreed to sell to him after giving the defendant a profit of RM100,000 on the transaction. The defendant said he was paid 10% on 11 March 1997, and issued two letters acknowledging receipt and
H a 'surat pelupusan hak' the same day. This was confirmed by Kamarudin. By Kamarudin's own account he had RM4–5millions in shares but saw no reason to pay the balance because the defendant did not press him for payment. He said normally he would expect to have 6 months to settle. He saw no reason to pay early. To him it was the mark of a good businessman
I to maximize and delay payment as much as possible. He made full and final payments in November 1998.

The evidence on the Batang Kali properties, Lot 1593 and Lot 1594. did not explain well the fact that the wording of the 'surat pelupusan hak'

(exh D20) suggests the purpose of getting a loan. Yet by his own evidence, SD4 did little to obtain any loan as he was too busy, and with the recession, interest rates were too high until recently. SD4 appears to be somewhat shallow as a witness and his obligation to settle a purchase. But whatever be the personal belief of SD4 as a businessman cannot be held against the defendant. The testimony of SD4 that the defendant had left the property to him, and that the defendant was not in any hurry to obtain payment from him remain unshaken. The economic circumstances, consequent caution by banks to lend and the high interest rates are matters of which it is proper to take public notice of.

The remaining question, relevant because of the requirement of wilfulness, is whether the defendant honestly believed that he had parted with all beneficial interest in the two properties. In this regard, the evidence of SD4 tends to corroborate the testimony of the defendant that he has done so. The fact there is no evidence of demand for payment, or to recover the property in the event payment is not made tends to support the argument that the defendant has parted with all interest to Kamarudin. The documents of title of the properties were at all times in the legal firm of SD4. The evidence only shows that while his friend may have failed him by being late in full payment, it is clear that he had not totally failed him since the balance was paid in November 1998.

Section 182A and all of the evidence adduced as to whether the prosecution has proved its case beyond reasonable doubt

There is nothing advanced in defence evidence that challenges the credibility of the prosecution witnesses. There is no demonstrable contradictions in the prosecution evidence. The only conclusion that can be made in the circumstances is that the defendant has failed to declare the four properties that are registered in his and his wife's names. Of that conclusion there is no reasonable doubt.

The following issues were pursued by the defence.

The notice was issued 'in the course of any investigation or proceeding relating to an offence' under the Act or any prescribed offence.

The investigation officer, Basri bin Idris, who had been made available by the prosecution, was called by the defence. Basri gave evidence that he was assigned to investigate a report lodged by one Omar bin Mahfuz at the s 11 police station in Shah Alam, Selangor.

Objection was made by the prosecution to the admissibility of the police report into evidence on the grounds it is hearsay upon hearsay. It was pointed out the Omar bin Mahfuz made his report on the basis of a newspaper report of the case involving the defendant not declaring certain large sums at Brisbane airport. The newspaper report itself is based on another newspaper report in Australia. *Mohamed Yatin bin Abu Bakar v PP* [1950] MLJ 57 was cited for the proposition the maker ought to be called. However in that case a part of the first information report was referred to as substantive evidence, and which was not in any case covered in the evidence

of the witnesses. The maker of the report was not called, and it appeared the lower court had relied on that part of the report.

In the case before me, the contents of the report is not at issue. What is relevant is the fact a report was made. The fact that it was made is relevant to the question as to whether there was an investigation or not. if the truthfulness of the contents of the report is at issue then the maker ought to be called. Since that is not the issue, in my view the report, being a public document under s 74 of the Evidence Act 1950 and a certified copy may be used to prove the contents of the public document under s 77 thereof. Since the copy submitted to the Court by the defence was supplied by the prosecution, certification is not strictly at issue in this case.

Section 108A of the CPC provides that a copy of the first information report under s 107 may be admitted as evidence of the contents of the original and of the time, place and manner in which the information was so recorded. The Evidence Act 1950 (see Chapter II) provides that whether the document is admitted or not in any particular case depends on whether it is relevant to a fact in issue or other relevant fact. In this case the defence has sought to admit it for the purpose of evidence as to whether there is in fact an investigation. On that basis it is relevant and admissible, and may be admitted through the investigating officer who acted upon it.

Basri gave evidence that when he received the file to conduct investigations, the case was classified under s 4(a) of the Prevention of Corruption Act 1961. The Australian newspaper report is in respect of the defendant having in cash in his possession and which he failed to declare. The report by Omar bin Mahfuz itself did not allege any offence as such, and the argument is that no investigation can arise from such a report.

Section 107 of the CPC merely provides for the receiving of 'information relating to the commission of an offence'. There is no requirement that a first information report must contain a reference to any particular offence. It is not exhaustive. In *Herchun Singh v PP* [1969] 2 MLJ 209 (FC) it was said at pg 211:

> As regards omissions in the first information report, we would endorse *Sohoni*'s commentary on s 154 of the Indian Criminal Procedure Code (16th Ed, Vol I, p 750); which is similar to s 107 of our Criminal Procedure Code, as follows:
>
> 'It is a mistake to believe that a person cannot be the accused unless his name appears in the first information report. The provisions of the Code lay down no such stipulation. All that is required for purpose of this section is that there should be clear, definite information about the commission of a cognizable offence to set the investigation machinery in motion. Further, the information required need not contain the circumstances of the commission of the offence, nor the names of the offenders or the witnesses, for the main purpose of investigation is to ascertain these matters ... . The first information report is not an Encyclopaedia. It is not the beginning and ending of every case. It is only a complaint to set the affairs of law and order in motion. It is only at the investigation stage that all the details can be gathered and filled up. But it cannot be said that omissions in the first information report would always be of no significance. The report is not substantive evidence and

omissions in it will not ipso facto lead to the case being thrown out. But it is a piece of corroborative evidence; omissions in it will, other things being the same, deprive the prosecution of the most valuable corroboration and thereby make the story suspicious. ...'

To give an interpretation that an offence has to be disclosed specifically, would naturally lead to the reasoning that the charge that may be preferred is limited to the offence disclosed in the information. Such an interpretation would be contrary to art 145(3) of the Federal Constitution. There is no restriction in the CPC that reports must be lodged by the victim or witness of an offence. To make such a requirement means that only the victim in a murder without witnesses may lodge a report. Such a result is wholly unacceptable. A first information report may be hearsay or even based on hearsay. It is upon the officer in charge, in evaluating the report to decide whether the first information report discloses the likelihood of an offence, primarily for the purpose of s 108 of the CPC as to whether it discloses a seizable or non-seizable offence. In this case it was classified under s 4(a) of the Prevention of Corruption Act for investigation. Only an investigation will determine whether there is sufficient evidence to charge a person in Court with the offence as classified or with any other offence that the investigation may disclose.

The evidence of Basri does not contradict, and in fact corroborates the notice that there was in fact an investigation under the Prevention of Corruption Act, and that the notice under s 25(1)(a) of the Act is valid. That the newspaper report refers to non-declaration of money in Brisbane is irrelevant. That the defendant was carrying a large sum in money in Brisbane is irrelevant. But it is entirely within the powers of the Anti-Corruption Agency to investigate how the defendant came by such substantial amount in cash, and in the course of any such investigation, to have a notice under s 25 to be issued.

It was argued neither the defendant, his wife or Dato' Raduan was informed that there was any investigation. The law requires a person to be informed of the accusation against him when he is arrested. There is no such legal requirement that any person, in particular an accused or his possible accomplice, be informed of any investigation or the charge being investigated.

I reject this part of the defendant's submissions as wholly without merit.

The properties were properties 'belonging to' the defendant or his wife and the defendant 'wilfully neglects or fails' to declare the four properties

With regard to the 139 Jln Athinahappan property, there is independent corroboration of a sale by a sale and purchase agreement dated 29 November, and stamped on 6 December 1998. Since the seller is the sister-in-law of the purchaser, there is nothing unbelievable that there is no urgency to register the transfer.

Since the beneficial ownership has been disposed of, then it cannot be said the property still belongs to the defendant's wife, and not declaration thereof cannot be said to be a wilful neglect or failure of a deliberate or

A contumacious nature. The prosecution had acted with commendable fairness in not pursuing the argument in respect of this property.

The evidence of the defendant in respect of the Bukit Lancong property is corroborated by the evidence of his wife and of Rohmat bin Kasmawi. Clearly from his appearance in the Court, Rohmat bin Kasmawi still B appears to be somewhat weak. It was argued by the prosecution that it does not appear consistent that a piece of agricultural land is given to Rohmat bin Kasmawi to work on when he is unfit to work as a driver, and the property is not close to his home. On the other hand, the unshaken evidence is that soon after his discharge Rohmat had gone to the defendant's house and was given the document of title. This was before the service of the notice under C s 25(1)(a). When Rohmat bin Kasmawi and his solicitor Ganaeswaren went to the defendant's house to obtain the defendant's wife's signature, there is no suggestion of reluctance to do so which would be consistent with sham transaction. There is also no suggestion the solicitor was chosen by the defendant or that Rohmat was referred to him by the defendant. The evidence Rohmat met him by chance is not successfully challenged. D According to the solicitor, the title is in the course of being transferred to Rohmat bin Kasmawi.

To hold that there is no gift on the bare argument advanced by the prosecution may deprive Rohmat bin Kasmawi of a gift that he might well have deserved after 11 years of faithful service to the defendant. The E defendant's wife has given clear evidence there was no strings attached to the gift. There is no such suggestion put to the defendant. Both the defendant and his wife risk exposure to giving false testimony if it should be found at any time the property is returned to them. In the circumstances I would accept the defendant's evidence that the property has been gifted to Rohmat bin Kasmawi.

F

In not declaring the two Batang Kali properties, he did not declare when and how these two properties were acquired. The explanation for non-declaration suggested in cross-examination and submissions is also that it was sold. But I note that unlike in the case of the 139 Jln Athinahappan property, there was no declaration in the sworn declaration G as to the sale price or receipt of any part thereof. There was no declaration of the RM100,000 'profit' from the sale. Even accepting the explanation that RM200,000 for the purchase was from the sale of 139 Jln Athinahappan, and nowhere is it stated that RM200,000 from the sale of 139 Jln Athinahappan was applied to the purchase of the Batang Kali lands, there was no explanation of the balance sum RM169,860. There is force in H the prosecution argument that it was difficult to believe that there was no sale and purchase agreement between the defendant and Kamarudin bin Ahmad. It appeared very much like a convenient excuse.

However there is no evidence or suggestion that there was no transfer in the process of being registered to contradict Kamarudin bin Ahmad, who I is a relatively senior member of the Bar. He corroborated the evidence of the defendant that final payment of the balance of purchase price was made in November 1998. His explanation for the delay in making full payment is that having paid the deposit of 10% he expected to have about 6 months to

pay the balance. By then because of the economic circumstance it became difficult for him to do so until November 1998. I must confess to holding some suspicion about the final payment being made close to the commencement of trial on 7 December 1998.

It is relevant to consider recent case law as to the legal position when a sale and purchase transaction occurs. In *Yeong Ah Chee v Lee Chong Hai & Anor & other appeals* [1994] 2 MLJ 614, Peh Swee Chin FCJ said :

> It is an old and well-settled rule of equity that under a valid contract for the sale of land, the beneficial ownership of the land passes to the purchaser who becomes the equitable owner, the vendor having a right to the purchase money for which he has a lien on the land. Please see *Lysaght v Edwards* and this case was cited with approval very often in our courts, eg by the Federal Court in *Inter-Continental Mining Co Sdn Bhd v Societe des Etains de Bayas Tudjuh* and *Temenggong Securities Ltd & Anor v Registrar of Titles, Johore & Ors.* When the full purchase price is paid, the vendor becomes a bare trustee, ie unqualified trustee for the purchaser. It is also of salutary effect to remind ourselves of the fact that rules of equity apply to this country by the Civil Law Act 1956 and of the observation of Lord Russel of Killowen in *Oh Hiam & Ors v Tham Kong*' that 'the Torrens system is designed to provide simplicity and certitude in transfer of land which is amply achieved without depriving equity of the ability to exercise its jurisdiction in personam on grounds of conscience.

The above suggests that the registered owner only becomes a bare trustee when full purchase price has been paid. In the later case of *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* [1996] 2 MLJ 12 (FC), Edgar Joseph Jr FCJ, after his usual exhaustive review of the law said at pg :

> In *Temenggong Securities Ltd & Anor v Registrar of Titles, Johore & Ors* [1974] 2 MLJ 45 (FC), Ong Hock Sim FJ said (at p 47):
>
> > 'The law is clear that the vendors, after receipt of the full purchase price and surrender of possession of the lands to the appellants [the purchasers) are bare trustees for the appellants of the said land ... .'
>
> This view was not dissented from by the Privy Council when their Lordships dealt with the matter on appeal (see [1976] 2 MLJ 44).
>
> But, in the earlier case of *Ong Chat Pang & Anor v Valiappa Chettiar* [1971] 1 MLJ 224 (FC), Gill FJ took a somewhat different view when he said (at p 229):
>
> > '... the point at which the vendor becomes constructively a trustee for the purchaser is reached only when he has done *all* that is necessary to divest himself of the legal estate by executing a valid transfer of the land in favour of the purchaser.' (Emphasis added.)
>
> Judith Sihombing in her book *National Land Code: A Commentary* (2nd Ed, 1992) at p 801 says that the proprietor has done all that is necessary when he has given the donee a transfer in registrable form and the issue document of title.
>
> In *Karuppiah Chettiar v Subramaniam* [1971] 2 MLJ 116 (FC), it was held (at p 119) that a vendor is regarded as having divested himself of all the beneficial interest in his land and vested it in the purchaser only at the time when the memorandum of transfer is executed and the purchase money is paid in full.

A In our view, the contractual events which result in the vendor becoming a bare trustee of the land, the subject matter of the agreement of sale and purchase, for the purchaser, is on completion, that is to say, upon receipt by the vendor of the full purchase price, timeously paid and when the vendor has given the purchaser a duly executed, valid and registrable transfer of the land in due form in favour of the purchaser, for it is then that the vendor divests himself of his interest in the land.

B

In our view, it is not a correct description of the relationship between the parties to a contract of sale and purchase of land to say, as did the High Court at Shah Alam in Ahmad bin Salleh [1995] 3 MLJ 211, that from the time a contract of sale and purchase of land is concluded, the vendor is a trustee for the purchaser. At that stage, they are only parties to a contract of sale and C purchase of which a court may, in certain circumstances, decree specific performance.

We cannot, however, give unqualified approval to the view of Prof Visu Sinnadurai, found at p 219 of his well-regarded book on *Sale and Purchase of Real Property in Malaysia* — which, it will be recalled, was the 'sheet anchor'of the judgment of the court below — that 'on the date of completion, if the D vendor becomes a bare trustee, it operates retrospectively by conversion to the date when the contract was made' as this proposition, if applied universally, could cause considerable difficulties in the workings of the Torrens system of registration of title or even a modified Torrens system of land registration — as in Sabah — contained in a codifying enactment. Take this very case, where between the execution of the sale and purchase agreement and completion, E the interest of the finance company ... .'

The above cases are in fact disputes between the parties under the respective land laws. The issue is somewhat different when considered from the criminal law. Firstly it is recognized that the title of a registered proprietor is indefeasible, carrying with it exclusive right of possession. F Secondly, it is recognized that such interest in the property may be separated into a purely legal interest and an equitable interest. While in the interests of the world at large for certitude and simplicity in the transfer of land is provided by dealing with the owner of the legal interest, ie the registered proprietor, recognition of the equitable interest, which is a personam issue between the two parties in respect of the land, does not G affect the certitude and certainty intended by the land code. The registered proprietor may be held accountable to the owner of the equitable interest, but not under the land code.

Equitable interests exist in many variations. We are concerned in this case primarily with the beneficial interest. If the registered proprietor no H longer holds the beneficial interest, the property cannot be said to be belonging to him. The issue is whether he has divested himself of the beneficial interest. Where all is done, including full payment, there is no question the beneficial interest has been divested. Where he has not been paid in full, the vexing question must remain. Yet it must be remembered the law recognizes that a person may divest himself of all interest, legal or I beneficial, at any time and in any manner he chooses. In this regard there is nothing to contradict the defendant and Kamaruddin that the defendant had divested himself of any interest in the property, that there is only an oral agreement for sale with the consideration that Kamarudin pays him at any time.

Upon consideration, I am reminded that the basis of conviction in our criminal law is proof beyond reasonable doubt. Suspicion however strong is not proof. The very strong submission on the facts by the Senior DPP cannot escape this limitation. Payment of deposit in cash, particularly between parties who know each other, without going through solicitors is not unusual. The lack of agreement appears consistent with the evidence that the defendant had chosen to divest himself of the property solely upon the basis the purchaser should pay him at any time. On the other hand, if indeed these explanations were contrived after a conscious effort not to declare the properties, it would be more in accord with the normal course of human conduct to ensure the completion of the transfers particularly after he has been arrested and charged. That did not happen. That the transfers proceeded in what may be described as a non-urgent manner tends to support the defendant's case.

That the charge against him did not specify the properties, and he has been informed only at the commencement of trial on 7 December 1998 only serves to add credibility to the argument that the manner the transactions proceeded had not in any way been affected by the charge against him, and were bona fide and truthful transactions. Given the short notice, the evidence given by the defence is much less likely to have been fabricated for the purpose of trial. It cannot be said Kamarudin paid in full in November 1998 just to help the defendant's case in December 1998. It would seem at least the transactions involving properties at Bukit Lancong and in Batang Kali were indeed proceeding to completion, in an unhurried manner consistent with a gift and a divestment on an oral understanding to be paid in due course. If the defendant was not paid it was his own risk. It tends also to support the defendant's contention of an honest belief he did not have to declare the properties because in his mind the properties no longer belonged to the defendant or his wife.

Summary and conclusion

When a person is brought and charged before the court, the primary concern of the court is, regardless of who is the defendant or accused person, to ensure there is a fair trial. A fair trial means a fair application of the laws, with a view that all relevant evidence offered by each party is admitted into evidence and given appropriate consideration. The court in so doing is confined to the evidence produced before it. In this we are guided by the laws and rules of evidence and procedure which represents the accumulated wisdom over time, to guide us to determine the truth or the facts of the case. Then, and only after hearing the submissions of the parties and considering the facts and the substantive law applicable, would the court make its decision on the charge. Then insofar as it is humanly possible justice will prevail. In the event I still make a mistake, I am comforted that there are two further courts of appeal to remedy any error.

In this case, I have been greatly assisted by both the senior DPP and his DPPs and the defence counsel. The senior DPP has presented the prosecution evidence clearly and without waste of time. The defence counsel, Mohd Shafee Abdullah has done likewise for the defence. They

have acted with civility to the court and equally importantly, as between themselves. Their conduct is a credit to the legal profession. In such atmosphere, truth and justice, in relation to the particular charge before the court, has the best opportunity to prevail.

The purpose of s 25 of the PCA 1961 is to require the person who best knows of his assets, moveable or immovable, to declare them, in order to assist in investigations. The purposive interpretation requires an interpretation that excludes a discretion on the part of the person served with such a notice to decide what he does or does not declare. Otherwise, s 25 becomes ineffective. Particularly in the case of land under the National Land Code the registered proprietor has an indefeasible right, including that of exclusive possession, and in view of s 110 of the Evidence Act, it is upon him to prove that he is not actually the owner.

In respect of 139 Jln Athinahappan, there is indirect declaration of the property. But such declaration is misleading. He declared the sale price, and in terms of the notice declared the sum is obtained from the sale of the property. Had he declared the property as would be necessary in view of the National Land Code and s 110 of the Evidence Act 1950, he would have to state how it was acquired. In respect of the other properties there was no declaration at all. Had they been declared, a sum of advance of RM169,860 from Dato' Raduan for the Batang Kali land and the manner of acquisition of the Bukit Lancong land would have to be disclosed and in all likelihood be required to be explained. With regard to the Batang Kali land, the failure to disclose avoided the need to declare its sale, and the profit of RM100,000. It avoids explaining it also.

The defence is that the defendant no longer owned the properties although registered still in his and his wife's names because: (a) he sold and was paid in full; (b) he sold but was paid just before trial; and (c) he had given the property away. In its bare summary, it does appear very suspicious.

Since it is for the defendant to assert non-ownership under s 110 of the Evidence Act 1950 in a court of law, and his witnesses cross-examined to test the truth of the assertion, it was right and proper therefore that the defendant be charged. Such a course could have been avoided if the defendant had chosen to err on the safer side since he is better served by declaring the same than not. But that is spilt milk.

Before this court, his evidence and that of his witnesses support the defence version that the defendant and his wife considered they no longer owned the property. The prosecution put it to the witnesses that the transactions were alleged to be initiated before the service of the s 25 PCA 1961 notice, the fact they remained in their names until the date of trial showed that the transactions were fabricated. These were denied and their evidence was not shaken. There was no evidence by the prosecution in rebuttal to show that they were not telling the truth.

The question I must answer, as mentioned above and under s 182A of the CPC is whether upon a consideration of all of the evidence adduced before me, I find that the prosecution has proved its case beyond reasonable doubt. Even if I do not believe the defence evidence, I must nevertheless

consider whether the defence, even if it is not believed, still raises a reasonable doubt.

The law in this country recognizes that equitable ownership may be separate from a legal ownership. The strong presumption of ownership upon a registered proprietor is rebuttable by evidence showing otherwise.

The testimony of the defendant and his wife that they had parted with all beneficial interest in the respective properties is corroborated by unshaken testimony of the transferees.

I take into account that the defendant being the Menteri Besar at the time, cannot possibly have imagined that the properties registered in his and his wife's names, and in particular within the State of Selangor, can avoid detection. Nothing could be gained by not declaring in such circumstances.

In addition, and relevant also to the question of intention and an honest belief, I must record that the defendant has conducted himself and his defence in a most exemplary manner from the time of his arrest and charge and until his trial before this court. He has entrusted himself to due process under our laws. Our laws and system of justice would have failed him if he is not at least given the benefit of the doubt even if his explanation is not believed.

Accordingly, pursuant to s 182A(iii) of the CPC, I record an order of acquittal upon the grounds that the prosecution has not proved its case beyond reasonable doubt.

Defendant acquitted.

Reported by Andrew Christopher Simon